(4)

No. 05-356

IN THE

Supreme Court of the United States

ALFRIEDA S. CONNOR SCOTT, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD CONNOR,

Petitioner,

v.

MICHAEL JOHANNS, SECRETARY OF AGRICULTURE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

The government has filed a letter advising the Court of the Eleventh Circuit's recent decision in *Ellis v. England*, __ F.3d __, No. 05-10957 (Dec. 16, 2005), a case decided after petitioner filed her reply. In *Ellis*, the Eleventh Circuit has weighed in on what it acknowledges is a circuit-split over whether a federal employee may file a Title VII action challenging only the remedy awarded in administrative proceedings. A few points about *Ellis* merit comment.

1. *Ellis*, like the D.C. Circuit's opinion below, recognizes that its holding that a federal employee must relitigate liability in order to challenge a deficient administrative remedy under Title VII is contrary not only to the decisions of the Fourth Circuit in *Pecker v. Heckler*, 801 F.2d 709 (4th Cir. 1986), and *Morris v. Rice*, 985 F.2d 143 (4th Cir. 1993), but also to the Ninth Circuit's decision in *Girard v. Rubin*, 62 F.3d 1244 (9th Cir. 1995). *See Ellis*, slip op. at 5-6. Specifically, the Eleventh Circuit observed:

> While some circuits, particularly the Fourth and the Ninth, have read our decision in *Moore*[, 780 F.2d 1559 (11th Cir. 1986),] to allow fragmentary *de novo* review of suits brought, not to enforce an EEOC decision, but rather seeking *de novo* review of that decision, *see Rice*, 985 F.2d at 145; *Pecker*, 801 F.2d at 711 n.3; *Girard*, 62 F.3d at 1247, we do not read *Moore* as permitting such fragmentary *de novo* review.

Id. at 6.

Ellis thus squarely contradicts the government's contention in its brief in opposition that there is no genuine disagreement between decisions adopting the government's position, such as *Ellis* and the decision below in this case, and the Ninth Circuit's opinion in *Girard*. Like the D.C. Circuit in the opinion below, *Ellis* openly acknowledges its rejection of *Girard*'s holding and reasoning.

2. *Ellis* also underscores the importance of the issue, the frequency with which it arises, and the need for definitive resolution of the conflict by this Court. *Ellis* marks the third published appellate decision this year alone on the point, and it reveals that the issue was the subject of an unpublished Eleventh Circuit decision last year as well. *See* slip op. at 4. The large number of appellate decisions addressing the issue, together with the many district court decisions cited in the petition for certiorari, indicates the importance of the issue both to Title VII plaintiffs and to the government.

3. Finally, the Eleventh Circuit's decision reflects the conceptual weakness of the government's position and the opinions of the courts that have adopted it. *Ellis* asserts, without pointing to any specific statutory language, that "the Fourth and Ninth Circuits' approach is contrary to the plain language of Title VII, 42 U.S.C. § 2000e-16(c), which provides for *de novo* review of EEOC decisions." Slip op. at 6. Simultaneously, however, *Ellis* acknowledges that, under *Moore*, a plaintiff *can* bring a Title VII action seeking enforcement of an EEOC decision without relitigating liability anew. *Id.* at 3-4. Nowhere does *Ellis* explain how the "plain language" of § 2000e-16(c)—the source of authority for both types of actions—can simultaneously require and not require a de novo liability determination by a district court before that court may grant a Title VII remedy. *Ellis* demonstrates the hollowness of the "plain language" rationale that is also at the heart of both the D.C. Circuit's decision below and the government's defense of that decision on the merits.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition and reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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